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MICHAEL RODAK, JR., CLE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-134

MRS. BILLIE MCCLURE,

Petitioner,

v.

THE SALVATION ARMY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF

1. Respondent seeks to argue, in its brief in opposition to the granting of certiorari (pp. 2-4), that the petition for certiorari was untimely filed, and that this Court is therefore without jurisdiction, pursuant to the provisions of 28 U.S.C. §2101(c). Respondent's argument is plainly mistaken.

In support of its argument, respondent asserts without the benefit of a single relevant supporting authority, that this Court should disregard the petition for rehearing filed by petitioner in the court below, and should compute the 90-day period allowed for filing a petition from the date of the original judgment of the court below. It is clear, however, and long has been so, that "A timely petition for rehearing tolls the running of the . . . period because it

operates to suspend the finality of the [lower] court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties." *Department of Banking* v. *Pink,* 317 U.S. 264, 266 (1942).

The authorities offered by respondent in urging that this Court ignore the above well-established rule simply are without relevance to the facts of this case. The 90-day period for petitioning this Court for a writ of certiorari is tolled not only by the submission of a petition for rehearing to the court below, but also where the lower court, even in the absence of such a petition, has altered its judgment in respect to a matter of substance, or resolved an ambiguity in the earlier judgment. The authorities offered by respondent are relevant only to cases of the latter type. See, generally, Stern & Gressman, *Supreme Court Practice,* §§6.3-6.4, at pp. 248-252 (4th ed. 1969); see also the *entire* section at 32 Am. Jur. 2d, "Federal Practice and Procedure," §285, at pp. 750-751 (1967), cited in part by respondent. Thus, in *Fed. Trade Comm.* v. *Minneapolis-Honeywell Regulator Co.,* 344 U.S. 206, 208-209 (1952), the petitioner had never sought rehearing in the court of appeals of the judgment which it contested, but had merely, over one month after the expiration of the period for seeking such rehearing, filed a "memorandum" which did not seek revision of any matter of substance in the earlier opinion of the court of appeals. Similarly, in *Department of Banking* v. *Pink, supra,* this Court found itself without jurisdiction not only because the petitioner had failed to seek rehearing in the state court below, but also because all that the petitioner had sought was a statement that a federal question had been presented. Thus, the motion "was

no more than a request that the Court of Appeals declare what had in fact occurred upon its previous decision of the case." 317 U.S. at 266.

By contrast to the above cases, the petitioner in the present case, within the 14-day period prescribed by Rule 40 of the Federal Rules of Appellate Procedure, presented to the court below a petition for rehearing, plainly designated as such (see respondent's brief, p. 25). It is clear that such a petition tolls the running of the period for seeking certiorari. Where such a petition was timely filed in the court below, there is no precedent whatever for making an exception to this general rule because of the contents of the petition for rehearing, or because of the ultimate disposition.

2. The brief in opposition urges that this Court should not be concerned with such "hypotheticals" as part-time ministers (p. 10). But it is a matter of record (Petition, pp. 9-10) and conceded by respondent (Brief, pp. 7-8), that, at least during the latter part of her employment, Mrs. McClure's ministerial duties were, at most, part-time. Respondent argues that Mrs. McClure was nevertheless performing "a religious function for the Salvation Army, even while sitting behind a typewriter" (p. 8). However, this is functionally equivalent to the employees of a church who likewise considered themselves to be performing religious duties, while working in their church's printing plant. See *Mitchell* v. *Pilgrim Holiness Church Corp.*, 210 F.2d 879 (7th Cir. 1954), cert. denied 347 U.S. 1013 (1954). The fact that a church employee[1] who works as a typist is also

[1] The court of appeals expressly found that Mrs. McClure was an "employee" within the terms of the statute, Pet. 17a, rejecting the contrary contentions of the Salvation Army.

qualified to perform ministerial duties does not make her any less an employee. Thus this case may not be likened, as respondent would have it, to that of a minister who has been ousted from, or denied, a pulpit. Compare *Gonzales* v. *Roman Catholic Archbishops of Manila,* 280 U.S. 1 (1929). The decision below is not limited to the "church-minister" relationship. Under the decision below, any church employee upon whom is bestowed the label "minister," is removed from the protection of equal opportunity legislation, regardless of the employee's actual duties.

3. Both respondent Salvation Army (pp. 12-16) and amicus curiae Salvation Army National Headquarters (pp. 11-12)[2] argue that the decision below was required by this court's decisions in *Watson* v. *Jones,* 80 U.S. (13 Wall.) 679 (1871); *Gonzales* v. *Roman Catholic Archbishops of Manila, supra; Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94 (1952), 363 U.S. 190 (1960); and *Presbyterian Church* v. *Mary E. B. Hull Mem. Presbyterian Church,* 393 U.S. 440 (1969). We pointed out in the petition (p. 16) that these cases reflect an understandable judicial reluctance to adjudicate church property disputes which turn on theological doctrines. See Clark, "Guidelines for the Free Exercise Clause," 83 HARV. L. REV. 327, 343-344 (1969). Moreover, where this rule has been held to bar judicial examination of selection of clergy, this Court has clearly enunciated an exception for "arbitrariness," *Gonzales, supra,* 280 U.S. at 16, or "improper methods of choice," *Kedroff, supra,* 344 U.S. at 116. A discharge of a female in violation of a Federal anti-discrimination statute certainly raises serious

[2] The Salvation Army National Headquarters is only nominally an amicus curiae. In fact it is the ecclesiastical superior and supervisor of the respondent. See amicus brief, p. 2.

questions of arbitrariness and improper methods, thereby falling well within the exception.

4. Both briefs in opposition confuse the essential question in this case. The statute allows a religious organization to discriminate on religious grounds, but on no others. There is much rhetoric, some of it fanciful,[3] about the consequences of a decision in Mrs. McClure's favor. But nowhere is it asserted that any tenet of Salvation Army ecclesiastical dogma or doctrine either requires, or even authorizes, discriminatory treatment of females, in terms of salary and benefits. The brief of the Salvation Army Southern Region misstates the issue by urging that Mrs. McClure seeks judicial examination of whether the Salvation Army violated its doctrine on "The Position of Women" (p. 15). Mrs. McClure seeks nothing of the kind. She seeks only her right to equal employment opportunity under an Act of Congress. If the Salvation Army would seek to justify its action by reference to its doctrine on "The Position of Women," or any other doctrine, this might be an entirely different case, since it might give rise to a claim under the exemption. Surely it is no burden on the exercise of religion for a religious interest which claims an exemption to at least specify a religious basis for its claim. Once the specification is made, there may indeed be limits on the extent to which it can be investigated, see *United States* v. *Ballard*, 322 U.S. 78 (1944); cf. Gianella, "Religious Liberty, Non-Establishment and Doctrinal Development," 80 HARV. L. REV. 1381, 1417 (1967) ("Of course,

[3] See, e.g., amicus brief, p. 12, where the EEOC is likened to "the tentacles of an octopus," and p. 19, where it is feared that the EEOC will "install a censor over the church government and religious practices of the Salvation Army."

a minimal inquiry is necessary to avoid making a mockery of both religion and government. . . .")

Salvation Army National Headquarters appears to concede (p. 13) that there is no doctrinal justification for discrimination against women, but then implies, somewhat disingenuously, that there may be Salvation Army doctrine dealing with race, color or national origin (p. 14). The short answer is that the only question in this case concerns sex discrimination. But the more encompassing answer is that the statute permits religious discrimination, and no other, and any claim under the exemption, be it directed at women, blacks, or any ethnic group, must, to be cognizable, at least *claim* the existence of doctrinal support. There is no need whatsoever for the EEOC to determine whether the Salvation Army is "adhering to its doctrines, tenets or practices" (p. 14). The only question is whether it is adhering to the law.

In sum, this is not an action on an employment contract, where Mrs. McClure argues that the Salvation Army has violated its doctrine on the status of women. This is an action under an Act of Congress banning sex discrimination, and the Salvation Army, which is authorized to discriminate on grounds of religion, is yet to come forward with even a bare claim that discriminatory treatment of women is theologically justified.

5. Salvation Army National Headquarters attacks (pp. 15-16) petitioner's analysis (p. 18) of the compelling governmental interest test of *Sherbert* v. *Verner,* 374 U.S. 398 (1963), by contending that the governmental interest in protecting Mrs. McClure from sex discrimination is less

than compelling.[4] This thesis is not supported by any citation to legislative history, judicial decision, or scholarly commentary.[5]

The National Headquarters brief responds to the first prong of the *Sherbert* test, whether there is any infringement of free exercise, again by merely referring to the church property cases (p. 15), but without any showing how the determination of this claim will require any examination of church doctrine. And the third prong of the *Sherbert* test, whether there is any less onerous alternative to the regulation, is simply ignored.

6. A leading scholar in this area has analyzed the cases involving economic regulation of religious interests as follows:

> "The courts will not require the state to grant an exemption from economic regulations to religious interests if a preferential benefit would be conferred. Exemption under these circumstances would not simply

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[4] The National Headquarters of the Salvation Army completely misconstrues the governmental interest involved by characterizing equal employment opportunity as no more than a "desirable" or "laudible" [sic] "objective" (p. 17). But the legislative history of the Civil Rights Act of 1964, and the events which led to its enactment, and the obligatory commands of the statute itself, establish that Congress did more than simply utter a few precatory words about the desirability of eliminating discrimination through voluntary action.

[5] It is wildly beside the point, and borders on the frivolous, for the Salvation Army to argue that if Mrs. McClure prevails, women will have to be admitted to the Roman Catholic priesthood, and nuns and priests will have to receive equal pay scales (amicus brief, p. 16). What amicus Salvation Army overlooks is that which is common knowledge, that almost 2000 years of theological doctrine and practice of the Roman Catholic Church requires that its priesthood be limited to males.

> relieve the religious practitioner from a burden on the free exercise of religion, but would also turn the regulatory scheme into a device for advancing a particular religion. Such a preference would violate the nonestablishment principle, regardless of the interpretation given the establishment clause, and engender the interreligious disputes and rivalries which that clause was meant to avoid. Thus the general rule appears to be that religious exemptions from economic regulations are denied where uniformity of treatment goes to the essence of the regulatory scheme." Gianella, *supra*, 80 HARV. L. REV. at 1398-1399 (footnote omitted).[8]

The "purpose and primary effect" of the statute is totally secular, under the test established by this Court in *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 222 (1963). The Salvation Army briefs in opposition, which totally overlook the *Schempp* test, emphasize instead, what they call the "entanglement" test of later cases (Respondent, pp. 16-17; amicus, pp. 17-18). But there is not even the slightest occasion to consider "entanglement," where there is no religious interest which is even visible, much less claimed. Salvation Army National Headquarters, in its effort to keep its employment practices immune from Congress, contends that "accommodation is not possible in this case" (p. 17). But the thrust of all this Court's recent decisions is to search for an accommodation, even

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[8] Decisions which reflect these principles are collected at p. 17 of the petition. See also *United States* v. *Kissinger*, 250 F.2d 940 (3d Cir.), cert. denied 356 U.S. 958 (1958) (religious scruples against wheat quotas); *Shapiro* v. *Lyle*, 30 F.2d 971 (W. D. Wash. 1929) (suit by chief rabbi of several Jewish congregations challenging constitutionality of National Prohibition Act because of restrictions on availability of wine for religious purposes).

if a "tight-rope" must be traversed, *Walz* v. *Tax Commission*, 397 U.S. 664, 672 (1970), "by preserving doctrinal flexibility and recognizing the need for a sensitive and realistic application of the Religion Clauses . . ." *Wisconsin* v. *Yoder*, —— U.S. ——, 40 U.S.L.W. 4476, 4480 (May 15, 1972).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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